




FEDERAL ELECTION COMMISSION
Washington, DC 20463

SENSITIVE

MEMORANDUM

TO: Commissioners
Staff Director
General Counsel

FROM: Office of the Commission Secretary 

DATE: September 17, 2003

SUBJECT: Statement of Reasons for MUR 5315
By Commissioner Scott E. Thomas

The attached document is being circulated for a 48-hour review prior to public release in order to avoid the inadvertent disclosure of enforcement thresholds or other sensitive information. Absent comments, the statement will be released at the conclusion of the 48-hour review period.

cc: Vincent Convery

Attachment

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

In the Matter of

Wal-Mart Stores, Incorporated)
Sam's Club Corporation)
Dole 2002 Committee and)
Brent Barringer, as Treasurer)

MUR 5315

STATEMENT OF REASONS

COMMISSIONER SCOTT E. THOMAS

In their Statement of Reasons for MUR 5315, Commissioners Smith, Toner and Mason stated that the Commission voted 6-0 to dismiss the above-captioned matter. Statement of Reasons for MUR 5315 at 1. I write this Statement of Reasons to emphasize that I did not vote to dismiss this important case. The vote in this matter was 4-2 with Chair Weintraub and Commissioners Mason, Smith and Toner voting to dismiss, and Commissioners McDonald and Thomas voting against. In so voting, I believe the Commission should have found reason to believe and investigated the significant violations alleged in the complaint.

This case centers upon material circulated by SAM'S CLUB (an incorporated entity and a division of Wal-Mart Stores, Inc.) on behalf of Elizabeth Dole—then a candidate for the United States Senate in North Carolina. Quoting from the August 31, 2002 *Raleigh News and Observer*, a complaint filed with the FEC stated that "Wal-Mart, the retail giant that is supporting Republican Senate candidate Elizabeth Dole, this week mailed to North Carolina homes nearly 200,000 copies of a company publication featuring Dole on the cover." Complaint at 1. Appearing in a mailing entitled *Source*, the piece featured pictures of Mrs. Dole apparently supplied by her campaign and a picture of Mrs. Dole with a child wearing what appears to be a "DOLE" campaign patch or button. The North Carolina Primary was held just two weeks after the mailing on September 10, 2002, and the general election was held two months later on November 5, 2002. The complaint alleged "this mailing represents an illegal campaign contribution made by Wal-Mart/Sam's Club for the direct benefit of Elizabeth Dole's campaign for the United States Senate." Complaint at 2.

3881-904-40-52

The Federal Election Campaign Act generally prohibits "any corporation whatever" from making any contribution or expenditure from corporate treasury funds in connection with a federal election and further prohibits any candidate or committee from knowingly accepting any such contribution. 2 U.S.C. §441b(b). The Act defines a "contribution or expenditure" to include "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or *anything of value* . . . to any candidate or campaign committee in connection with" any federal election. 2 U.S.C. §441b(b)(2) (emphasis added). The Commission's regulations define "anything of value" to include "all in-kind contributions" and further explain that "the provision of any goods or services without charge . . . is a contribution." 11 C.F.R. §100.7(a)(1)(iii)(3)(A).

There is no doubt that the material distributed by SAM'S CLUB/Wal-Mart, with the cooperation of the Dole campaign, constituted something of "value" to the Dole campaign in violation of §441b. The only question is whether that corporate expenditure qualified for either one of two exceptions to the general corporate ban found in § 441b. The Act specifically excludes certain press activities from the definition of contribution or expenditure. Qualification for the so-called "press exemption" is reserved for:

any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.

2 U.S.C. §431(9)(B)(i). The Act also allows membership organizations to use otherwise prohibited funds to make partisan communications advocating the election or defeat of a candidate to its members and to solicit its members for contributions to a separate segregated fund. 2 U.S.C. §441b(b)(4)(C).

The legislative history of the press exemption indicates that Congress sought to "assure the unfettered right of *newspapers, TV networks, and other media* to cover and comment on political campaigns." H. R. Rep. No. 93-1239, at 4 (1974)(emphasis added). Obviously, SAM'S CLUB/Wal-Mart is not a media or press entity. Rather, under the heading "About Us" and the subheading "Who We Are," SAM'S CLUB describes itself this way:

SAM'S CLUB is a place where business operators and their families, as well as informed deal seekers, can find consistent savings on more than 4,000 items; including appliances and electronics, office supplies, fresh food, clothing, optical and pharmacy services, home furnishings, books, batteries, and auto supplies.

* * * * *

SAM'S CLUB is a division of Wal-Mart Stores, Inc., the world's largest retailer with annual sales of more than \$218 billion.

samsclub.com

With this as background, I do not believe *Source* qualifies for the press exemption. The Commission has indicated that "[o]nly magazines and periodicals which ordinarily derive their revenues from subscriptions and advertising" are to be exempt under the press exemption. See Explanation and Justification for Regulations on Funding and Sponsorship of Candidate debates, 44 Fed. Reg. 76734, 76735 (Dec. 27, 1979) *relied on in* MUR 3607, General Counsel's Report at 4 (November 2, 1993).¹ There is no indication in the record, and respondents do not argue, that *Source* derives *any* revenues from advertising or subscriptions. To the contrary, *Source* appears to be nothing more than a sophisticated advertising brochure sent by SAM'S CLUB to its customers. Indeed, in the 31 page *Source* mailing containing the article promoting Mrs. Dole, approximately 23 pages contained ads for products or descriptions of services available at SAM'S CLUB. See Attachment to Complaint. If advertising brochures distributed by corporations are considered exempt from the general §441b prohibition simply because a corporation asserts the press exemption, then the ban on corporate contributions will mean very little.

Likewise, I doubt that SAM'S CLUB "members" are members for purposes of the Act. If anything, they appear to be customers who simply pay a fee in order to shop at "warehouse prices":

SAM'S CLUB offers exceptional value on brand name merchandise at "members only" prices for both business and personal use. SAM'S CLUB operates by selling merchandise at very low profit margins, which are passed along to the members in the form of low, warehouse prices. *Profits are primarily derived from membership sales.*

samsclub.com (emphasis added). As such, the membership exception appears to be unavailable.²

The Supreme Court has recognized that the exceptions to the general §441b prohibitions should be narrowly construed. In rejecting a media exemption claim in *Massachusetts Citizens for Life v. FEC*, 479 U.S. 238, 251 (1986)(emphasis added), the


¹ In MUR 3607, the Commission found no reason to believe that *WorldTraveler* in-flight magazine published by Northwest Airlines was in violation of §441b. The General Counsel's Report specifically pointed out "Although there is no evidence that *WorldTraveler* generates subscription revenue, it apparently generates advertising revenue, which is shared by Skies and Northwest." General Counsel's Report at 7 (November 2, 1993).

² To qualify as a member, membership "dues" or "direct participatory rights in the governance of the organization" are required under 11 CFR 114.1(e)(2).

Court stated, "A contrary position would open the door for those corporations and unions with in-house publications to engage in unlimited spending directly from their treasuries to distribute campaign material to the general public, *thereby eviscerating §441b's prohibition.*" Similarly, in rejecting a membership claim in *FEC v. NRWC*, 459 U.S. 197, 204 (1982)(emphasis added) the Court specifically found that to adopt a broad definition of "member" would "open the door to all but unlimited corporate solicitations and thereby *render meaningless* the statutory limitation to 'members.'"

Consistent with the concerns express by the Supreme Court, I believe the Commission should have pursued this significant matter.

9/12/03
Date



Scott E. Thomas
Commissioner